U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-U-P-C-

DATE: NOV. 18, 2015

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a university acupuncture clinic, seeks to permanently employ the Beneficiary permanently in the United States as an acupuncturist. *See* section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The Director, Nebraska Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL). The priority date of the petition is June 17, 2014, which is the date the labor certification was accepted for processing by DOL.[1] *See* 8 C.F.R. § 204.5(d).

The record reflects that the appeal is properly filed, timely, and that it makes specific allegations of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted on appeal. The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulation by 8 C.F.R. § 103.2(a)(1).

The Petitioner has appealed the Director's determination that the record does not establish that the Beneficiary holds a Master's degree from an accredited university or college in the United States, as required for classification as an advanced degree professional under section 203(b)(2) of the Act. For the reasons discussed below, we will affirm the Director's findings in this matter.

[1] The ETA Form 9089 was originally submitted in support of a Form I-140, Petition for Alien Worker, filed by the Petitioner on January 24, 2012, which was denied on May 9, 2012. However, USCIS continues to accept duplicate Forms I-140 in cases where the original labor certification was submitted in support of a previously-filed petition during the original labor certification's validity period and the petitioner is filing a new visa petition subsequent to the denial of that petition, so long as the labor certification was not invalidated due to material misrepresentation or fraud relating to the labor certification application.

I. ELIGIBILITY FOR CLASSIFICATION AS ADVANCED DEGREE PROFESSIONAL

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1).

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(2) defines the term "advanced degree" as:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree

In the present case, the record reflects that the Beneficiary holds a 2012 Master of Science in Oriental Medicine (MSOM) from [redacted] California. In his March 6, 2015, decision, the Director concluded that, although "pre-accredited" since August 1, 2010 by the Accreditation Commission for Acupuncture and Oriental Medicine (ACAOM), [redacted] was not an accredited educational institution. Accordingly, he found that the Beneficiary's degree from [redacted] was not the advanced degree defined by the regulation at 8 C.F.R. § 204.5(k)(2) and that she was, therefore, not eligible for classification as an advanced degree professional under section 203(b)(2) of the Act.

A. Accreditation Requirement

On appeal, the Petitioner contends that there is no statutory or regulatory authority that requires the Beneficiary to hold an advanced degree awarded by an accredited university or college. Although the Petitioner correctly notes that the definition of advanced degree provided by 8 C.F.R. § 204.5(k)(2) does not require that such a degree come from an accredited college or university, we find the accreditation requirement to be implicit in the language of the regulation.

The Act is a federal statute with nationwide application. The regulations implementing the Act – including 8 C.F.R. § 204.5(k)(2) defining "advanced degree" for the purposes of section 203(b)(2) of the Act – also have nationwide application. As defined in 8 C.F.R. § 204.5(k)(2), an "advanced degree" includes "any **United States** academic or professional degree . . . above that of baccalaureate" (or a foreign equivalent degree), "[a] **United States** baccalaureate degree" (or a foreign equivalent degree) and five years of specialized experience (considered equivalent to a master's degree), and "a **United States** doctorate" (or a foreign equivalent degree). (Emphases

added.) Similarly, "professional" is defined in 8 C.F.R. § 204.5(l)(2) as "a qualified alien who holds at least a **United States** baccalaureate degree" (or a foreign equivalent degree). (Emphasis added.) The repeated usage of the modifier "United States" to describe the different levels of (non-foreign) degrees makes clear the intention of the rule makers that the regulations apply to degrees issued by U.S. educational institutions that are recognized and honored on a nationwide basis. The mechanism through which U.S. educational institutions achieve such national recognition is accreditation.

On its website, the U.S. Department of Education (DEd), which identifies the accreditation status of U.S. colleges and universities to determine their eligibility for federal funding, student aid, and participation in other federal programs, states the following:

> The U.S. Department of Education does not accredit educational institutions and/or programs. However, the Secretary of Education is required by law to publish a list of nationally recognized accrediting agencies that the Secretary determines to be reliable authorities as to the quality of education or training provided by the institutions of higher education and the higher education programs they accredit. An agency seeking national recognition . . . must meet the Secretary's procedures and criteria for the recognition of accrediting agencies, as published in the *Federal Register* . . . . The Secretary . . . makes the final determination regarding recognition.
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> . . . . The United States has no . . . centralized authority exercising . . . control over postsecondary educational institutions in this country. . . . [I]n general, institutions of higher education are permitted to operate with considerable independence and autonomy. As a consequence, American educational institutions can vary widely in the character and quality of their programs.
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> The practice of accreditation arose in the United States as a means of conducting nongovernmental, peer evaluation of educational institutions and programs. Private educational associations of regional or national scope have adopted criteria reflecting the qualities of a sound educational program and have developed procedures for evaluating institutions or programs to determine whether or not they are operating at basic levels of quality.

http://www2.ed.gov/print/admins/finaid/accred/accreditation.html (accessed November 5, 2015).

Outside the federal sphere, the Council for Higher Education Accreditation (CHEA), an association of 3,000 degree-granting colleges and universities, plays a similar oversight role. As stated on its website:

> 1. [P]residents of American universities and colleges established CHEA [in 1996] to strengthen higher education through strengthened accreditation of higher education institutions . . . .

> 2. CHEA carries forward a long tradition that recognition of accrediting organizations should be a key strategy to assure quality, accountability, and improvement in higher education. Recognition by CHEA affirms that standards and processes of accrediting organizations are consistent with quality, improvement, and accountability expectations that CHEA has established. CHEA will recognize regional, specialized, national, and professional accrediting organizations.
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> 3. Accreditation, as distinct from recognition of accrediting organizations, focuses on higher education institutions. Accreditation aims to assure academic quality and accountability, and to encourage improvement. Accreditation is a voluntary, non-governmental peer review process by the higher education community . . . . The work of accrediting organizations involves hundreds of self-evaluations and site visits each year, attracts thousands of higher education volunteer professionals, and calls for substantial investment of institutional, accrediting organization, and volunteer time and effort . . . .

http://www.chea.org/pdf/Recognition_Policy-June_28_2010-FINAL.pdf (accessed November 5, 2015).

To be recognized nationally a U.S. university or college must be accredited by an organization recognized by DEd and CHEA. As stated on their respective websites, accreditation is intended "to assure academic quality and accountability" (CHEA) and to provide "a reasonable assurance of quality and acceptance by employers of . . . degrees" awarded by the accredited institutions (DEd). Accreditation guarantees that a school's degrees will be recognized and honored nationwide in keeping with the intent of USICS regulation. Accordingly, U.S. Citizenship and Immigration Services (USCIS) finds the emphasis placed on nationwide recognition by the regulation at 8 C.F.R. § 204.5(k)(2) to require that a U.S. academic degree be issued by an accredited university or college.

This interpretation is supported by federal case law in *James Tat-Wing Yau v. District Director of the United States Immigration and Naturalization Service* (*Yau*), 293 F. Supp. 717 (D.C. Cal. 1968) and *Philip Tang v. District Director of the U.S. Immigration and Naturalization Service (Tang)*, 298 F.Supp. 413 (D.C. Cal. 1969). In both *Yau* and *Tang,* the district court agreed with the legacy Immigration and Naturalization Service (INS, now USCIS) that Yau's and Tang's electronic engineering degrees from [redacted] in California, an institution that was not accredited, did not entitle them to third preference visas as the degrees were not equivalent to bachelor's degrees from an accredited U.S. college or university. *Yau,* at 419. In *Tang*, the district court's decision was affirmed without further discussion by the U.S. Court of Appeals for the Ninth Circuit in a *per curiam* ruling. *Tang*, at 413.

On appeal, the Petitioner asserts that the above case law is not relevant in this matter as the cases on which USCIS relies are more than 37 years old, were applied in the context of "Schedule 2, Group A cases," and do not take into account the "evolution of pre-accreditation status obtained by schools such as [redacted] The Petitioner further contends that the differences between it and

[redacted] in *Yau* and *Tang* make any reliance on these cases unreasonable and an abuse of discretion.

The Petitioner asserts that it is pre-accredited by ACAOM and has been approved by the California Acupuncture Board. It also states that the Beneficiary's MSOM degree, which has been issued by an institution whose credits and degrees are recognized by accredited universities, cannot be compared to the engineering degree issued by the unaccredited [redacted] as that institution's credits were not accepted by the [redacted] In support of its claims, the Petitioner submits questions and answers from a February 14, 2013, stakeholder call in which the Nebraska Service Center (NSC) is reported to have acknowledged that *Yau* and *Tang* "were old cases and applied in Schedule 2, Group A cases," and that they would seek legal review of their authority to require that an academic degree come from an accredited university or college.

While we note the Petitioner's assertions regarding USCIS' inappropriate reliance on *Yau* and *Tang* in this matter, they are not persuasive. Our reading of the Director's decision does not find his references to *Yau* and *Tang* to suggest any parallels or similarities between the facts in these cases and the instant case. Instead, the decision's reference to these decisions appears to be related solely to what these decisions have to say about USCIS' authority, in immigration matters, to require that academic degrees be issued by accredited colleges and universities. The Director's reference to the courts' holdings, which found that legacy INS had not abused its discretion in requiring Yau's and Tang's degrees to be issued by an accredited academic institution, was, therefore, appropriate in addressing the question of whether the Beneficiary's degree from [redacted] qualifies her for classification as an advanced degree professional under section 203(b)(2) of the Act.

We have also reviewed the submitted questions and answers from the February 14, 2013 stakeholder call with the NSC. While we note that Service Center representatives indicated that they would seek review of USCIS' authority to require that academic degrees submitted in support of immigrant visa petitions be issued only by accredited educational institutions, this response does not demonstrate that USCIS lacks the authority to impose this requirement or that the Director erred in finding that, absent a Master's degree from an accredited university or college, the Beneficiary is not eligible for classification under section 203(b)(2) of the Act. We further note that, even if NSC representatives had indicated that the holdings in *Yau* and *Tang* did not apply in this matter, we are not bound by Service Center decisions. *See Louisiana Philharmonic Orchestra vs. INS,* 44 F.Supp. 2d 800 (E.D. La. 2000), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert denied*, 122 S.Ct. 51 (2001).

B. Petitioner's Pre-Accredited Status

On appeal, the Petitioner also contends that the Director failed to take into account "the evolution of pre-accredited status as it applies to universities throughout the United States and California in particular for those offering master's level programs in acupuncture and Oriental medicine." It notes that it holds pre-accredited status from the Accreditation Commission for Acupuncture and Oriental Medicine (ACAOM), an accrediting agency recognized by the U.S. Department of Education (DEd), and that ACAOM makes no distinction between accredited and pre-accredited status for U.S. universities "in recognizing [a] first professional Master's degree and professional Master's level

certificate and diploma programs in acupuncture and Oriental medicine."

However, as indicated by the Director in his decision, ACAOM's "Policies and Procedures" manual establishes only that "Pre-accreditation ('candidacy') status may be used an alternative to full accreditation . . . for the purpose of establishing eligibility to participate in Title IV programs," not that ACAOM does not distinguish between pre-accredited and fully accredited academic programs. Instead, the manual describes in great detail the process for achieving "candidacy status" and the candidacy period during which an academic program submits annual and bi-annual progress reports, sustaining candidacy dues, and a letter of intent to pursue initial accreditation; attends a Self-Study workshop; conducts a Self-Study process; submits a Self-Study report; hosts an accreditation site visit; and provides a formal institutional response to the site visit report, along with other required documentation. Only when ACAOM determines that an institution or program meets the necessary requirements, standards and criteria, and "there is no question or concern regarding the institution's compliance" does it grant accreditation.

The Petitioner further asserts that USCIS has already accepted that pre-accredited institutions fall within the definition of "institution of higher education," which is used in determining prevailing wages for institutions of higher education under the American Competitiveness and Workforce Improvement Act (ACWIA). *See* 20 C.F.R. § 656.40(e)(1)(i) . As additional proof of the acceptance of pre-accredited status for universities in California, the Petitioner points to the approval of its acupuncture program by the California Acupuncture Board, which, it states, is of "more significance than being accredited by ACAOM." The Petitioner also points out that that Section 4927.5 of the California Business and Professions Code defines an "approved" academic program in California as one that has been accredited or pre-accredited by ACAOM.

Although the above claims are noted, we, again, do not find them to be persuasive. The recognition of a pre-accredited academic institution as an "institution of higher education" for the purposes of computing the prevailing wage for a job opportunity under 20 C.F.R. § 656.40(e)(1) is not relevant here. The designation of university or college as an institution of higher education is not the equivalent of academic accreditation. Further, the California Acupuncture Board's approval of the Petitioner's acupuncture school, which has the effect of allowing its graduates to sit for the California licensing examination, does not overcome the fact that it is not accredited. As noted by the Petitioner, state approval of an acupuncture program in California may be granted to both accredited and pre-accredited institutions.

Even if we were to accept the Petitioner's assertion that there is no longer a real difference between accredited and pre-accredited educational institutions, we would not find the Beneficiary's degree from [redacted] to establish her eligibility for classification as an advanced degree professional under section 203(b)(2) of the Act. Although we find the record to contain evidence that the Petitioner's acupuncture program was pre-accredited by ACAOM as of August 1 2010, a review of ACAOM's website does not indicate that Stanton University continues to be a candidate for accreditation. Instead a "Written Notice of Accrediting Decisions," dated September 15, 2014,

reports that the accreditation of has been denied, effective August 16, 2014.[2] A subsequent December 5, 2014, ACAOM notice reports that, on November 8, 2014, 's pre-accreditation or candidacy was also denied.[3] Therefore, on the date the Petitioner filed the appeal in this matter, April 8, 2015, not only had its bid for ACAOM accreditation been denied but it no longer held pre-accredited status.

While the ACAOM notices indicate that neither decision should be considered final as they are both subject to reconsideration and appeal, the notices establish for the purposes of this proceeding that the Beneficiary does not hold a Master's degree awarded by an accredited university or college. Accordingly, the Beneficiary's MSOM does not qualify as an advanced degree within the meaning of 8 C.F.R. 204.5(k)(2). We also note that, based on the September 15 and December 5 ACAOM notices, it appears that the Petitioner's program in Oriental medicine no longer qualifies as an approved academic program under California law, which may affect its approval by the California Acupuncture Board.

For the reasons just discussed, the record does not demonstrate that the Beneficiary's holds an advanced degree from an accredited U.S. university. Accordingly, she is not eligible for classification as an advanced degree professional under section 203(b)(2) of the Act and we will affirm the Director's denial of the visa petition on this basis.

II. MINIMUM REQUIREMENTS OF OFFERED POSITION

When evaluating the job offer portion of the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

A petitioner must establish that a beneficiary meets the requirements of the labor certification as of the priority date, the date on which the labor certification was accepted for processing by the U.S. Department of Labor. In the instant case, the labor certification states that the offered position of acupuncturist requires a Master's degree in Oriental Medicine (Parts H.4. and 4-A.). No other field of study is acceptable (Part H.7.), nor is any combination of education and experience (Part H.8.). Although the labor certification reflects that the Petitioner will accept the foreign educational equivalent of a Master of Science in Oriental Medicine (Part H.9.), it has submitted no evidence to establish that the Beneficiary holds such a degree. Therefore, to establish that the Beneficiary in this matter meets the requirements of the labor certification, the Petitioner is required to demonstrate that she holds a U.S. Master's degree in Oriental Medicine from an accredited U.S. educational institution.

However, the Beneficiary holds a MSOM degree from which, as just discussed, is not an accredited university. Accordingly, the Beneficiary's degree, as it was not awarded by an

[2] *See* http://www.acaom.org/documents/file/acaom-written-notice-of-accrediting-decisions.
[3] *See* http://www.acaom.org/documents/file/acaom-written-notice-of-accrediting-decisions.

accredited U.S. educational institution, does not qualify as an "advanced degree" under the regulation at 8 C.F.R. § 204.5(k)(2). Therefore, it does not satisfy the requirements of the labor certification and the visa petition must be denied for this reason as well.

III. CONCLUSION

The record does not establish that the Beneficiary holds an "advanced degree" within the meaning of 8 C.F.R. § 204.5(k)(2). Thus, the Petitioner has not demonstrated that she qualifies for classification under section 203(b)(2) of the Act or that she meets the job requirements set forth in the labor certification. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

In visa proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met. Accordingly, we will affirm the Director's denial of the visa petition and dismiss the appeal.

ORDER: The appeal is dismissed.

Cite as *Matter of S-U-P-C-*, ID# 14465 (AAO Nov. 18, 2015)